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No. 73-572

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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NANCY L. FARHA, ET AL., PETITIONERS

*v.*

UNIFIED SCHOOL DISTRICT NO. 259
WICHITA, KANSAS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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*Solicitor General,*
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Petitioners seek review of a court of appeals decision holding that the respondent school district was acting within its authority in adopting and implementing a plan of student desegregation. In our view, the decision was correct, and, indeed, compelled by this Court's opinion in *McDaniel* v. *Barresi,* 402 U.S. 39.

1. The desegregation plan at issue was adopted by the school district in May 1971, after a decision by an administrative hearing examiner of the Department of Health, Education and Welfare, finding that the school board was operating at the elementary school level a dual system of schools on the basis of race in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d (see Pet. App. A8-A9). The plan created and adopted by the school district concentrated on removing the racial

identifiability of seven predominantly black elementary schools,[1] and was approved by HEW in August 1971.[2]

The district court dismissed the petitioners' complaint, finding that the school district had acted within its state and federal authority in adopting and implementing the plan (Pet. App. A20-A30). The court also ruled that the petitioners lacked standing to challenge the proceedings before HEW, and that in any event such a challenge was premature because HEW had made no final decision to terminate funds for the district (Pet. App. A30-A32). The court of appeals affirmed unanimously (Pet. App. A1-A4).[3]

2. Petitioners contend (Pet. 8) that the school district's actions were not within the purview of *McDaniel* v. *Barresi, supra,* because the district did not have authority under state law to take those actions. The district court expressly found, however, that the steps taken did not violate state law (Pet. App. A20-A26), and the court of appeals did not disturb that holding. In any event, having determined that a dual system existed in its schools, the school district was but carrying out its responsibility "to correct * * * the condition that offends the Constitution." *Swann* v. *Charlotte-Mecklenburg Board of*

[1] The plan is described in detail in the district court's opinion (see Pet. App. A11-A16).

[2] Federal financial assistance to the school district was never terminated in light of the district's adoption of the plan (see Pet. App. A8-A9).

[3] The school district has filed a brief in opposition to the instant petition.

*Education*, 402 U.S. 1, 16; see *McDaniel, supra*, 402 U.S. at 41.[4]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
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NOVEMBER 1973.

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[4] Petitioners' suggestion (Pet. 9) that the plan adopted by the school district imposes on them a penal servitude in violation of the Thirteenth Amendment is, as the district court put it, a "novel contention * * * without merit" (Pet. App. A29). This argument misconstrues the purpose and scope of the Thirteenth Amendment, see *Butler* v. *Perry*, 240 U.S. 328, 332, and is contrary to this Court's decisions on the appropriateness of a school district's provision of transportation for its students. *Swann, supra*, 402 U.S. at 29-30; cf. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46.